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Supreme Court of the United States

October Term, 1963

No. 16

BANCO NACIONAL DE CUBA,
Petitioner,

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN SUPPORT OF MOTION FOR SUBSTITUTION OF COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA IN LIEU OF PETER L. F. SABBATINO, RECEIVER

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September 30, 1963

Supreme Court of the United States

October Term, 1963

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Compania Azucarera Vertientes-Camaguey de Cuba (hereinafter "C.A.V.") files this brief on its motion to be substituted as Respondent in lieu of Receiver Peter L. F. Sabbatino pursuant to order of this Court dated June 17, 1963 (374 U.S. 820).*

* In a separate brief filed herewith pursuant to the said order of June 17, 1963, C.A.V. has presented its position on the merits of this appeal.

Proceedings Below

The instant motion is brought in conjunction with the case reported at 307 F.2d 845, affirming 193 F. Supp. 375.

Jurisdiction

The jurisdictional statement appears at page 2 of the movant's brief on the merits and is incorporated herein.

Rules Involved

Although decisional law is principally relied upon, the movant relies also on Rule 25(c) of the Federal Rules of Civil Procedure, 28 U.S.C.

This rule in pertinent part provides:

> "(c) **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

Question Presented

In the circumstances, should not C.A.V. be substituted for the receiver, who has been discharged by the appointing court?

Statement

A full statement of the facts involved in this case is set forth at pages 3 through 8 of movant's brief on the merits.

For the convenience of the Court those facts of particular significance to the motion are set forth below.

This is an action purportedly in conversion brought by Petitioner, the financial agent of the Republic of Cuba

(R. 5-6), against a New York partnership, Farr, Whitlock & Co. (hereinafter "Farr"), original purchaser of the sugar in question, and against the temporary receiver of certain assets of C.A.V. including the proceeds of the sugar in question.

The receiver was appointed in a separate but factually related action in the Supreme Court of the State of New York, Kings County (hereinafter "the *Schwartz* action"),* on or about August 16, 1960 (R. 7). On August 26, 1960, Farr, faced with a claim to the proceeds of the sugar both from C.A.V. and from Petitioner (R. 20-21, 24-28), and having been enjoined by the state court in the *Schwartz* action from disposing of the assets of C.A.V. (R. 44-45), entered into an agreement with C.A.V. whereby it agreed to hold the proceeds of the sugar until their disposition was directed by court order. In return, C.A.V. agreed, *inter alia*, to indemnify Farr against any claim arising from Farr's retention of the proceeds.

On October 10, 1960 this action was commenced, and on October 24, 1960 the state court in the *Schwartz* action ordered Farr to transfer the proceeds in question, less a commission, to the receiver (R. 51-52, 79-80). Shortly after the transfer pursuant to this order, Petitioner amended its complaint to seek to enjoin the receiver from exercising any jurisdiction over the proceeds. (R. 10)

On October 31, 1962, after trial, the state court in the *Schwartz* action decreed that the receivership be terminated and the assets restored to C.A.V. This was done and an interim order was entered upon a stipulation dated January 14, 1963 between the attorneys for the receiver and C.A.V., and approved by the attorneys for Farr and Petitioner and by a banking company. The stipulation

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Schwartz v. *Compania Azucarera Vertientes-Camaguey De Cuba*, 39 Misc. 2d 63, 66, 240 N.Y.S. 2d 247, 250 (N.Y. Sup. Ct. 1962).

provided that the proceeds be held in escrow pending disposition of this case and that, in the event Petitioner should prevail in the case, the proceeds should be transferred to it. By separate agreement signed on March 28, 1963 among C.A.V., Farr, Petitioner, receiver and Lehman Brothers, the latter was made escrow agent of the proceeds pending a disposition of the instant action. On the same date, because the authority of the receiver had been terminated and C.A.V.'s interest in the fund was thus no longer represented in this case, C.A.V. moved this Court for leave to be substituted as a party respondent in lieu of the receiver. This Court, on June 17, 1963, entered an order granting leave to C.A.V. to file this brief and a brief on the merits and to participate in oral argument.

I.

THIS COURT HAS THE INHERENT POWER TO ALLOW SUBSTITUTION OF PARTIES IN THE INTERESTS OF JUSTICE.

The practice in this Court is governed not alone by the rules which it has promulgated, but also by the Court's inherent power to adapt procedure to effect substantial justice.

> "All courts, federal and state, have a broad and inherent power 'over their own process, to prevent abuses, oppression and injustice,' so 'as not to produce hardship'; and to do substantial justice." (Footnotes omitted.) *Moore's Federal Practice*, para. 0.60 [6] at 612 (1961):

The federal courts freely exercise their inherent power in matters involving the substitution of parties. See, *e.g.*, *National Bank of Washington* v. *District of Columbia*, 226 F.2d 763 (D.C. Cir. 1955); *Acheson* v. *Fujiko Furusho*, 212 F.2d 284, 296 (9th Cir. 1954); *American Fidelity & Casualty Company* v. *All American Bus Lines, Inc.*, 190 F.2d

234 (10th Cir.), *cert. denied*, 342 U.S. 851 (1951); *McDonald v. State of Nebraska*, 101 Fed. 171, 177 (8th Cir. 1900).

In the *American Bus Lines* case, the Court of Appeals for the Tenth Circuit rejected the argument that substitution was improper because the facts of the case did not fall within any of the categories of Rule 25 of the Federal Rules of Civil Procedure, and it approved the exercise of the inherent power of the court.

> "The primary purpose of the new rules of federal procedure was to simplify and clarify procedure and to expedite litigation. The rules indicate clearly a general policy to disregard narrow technicalities and to bring about the final determination of justiciable controversies without undue delay. And that being their purpose, they should be liberally construed. [Citations omitted.] Bus Company was only a nominal plaintiff. Security was the real party in interest for whose benefit the action was brought. And the substitution did not introduce a new cause of action into the case. In the circumstances presented, it was well within the range of power of the trial court to authorize the substitution of Security as the party plaintiff. To hold otherwise would be nothing less than a narrow and ill-grounded construction of the rules of civil procedure not in harmony with their intent and purpose." 190 F.2d at 236-37.

The Court of Appeals for the District of Columbia Circuit exercised its inherent powers in a similar manner when it allowed a widow, seeking to challenge an inheritance tax assesment, to be substituted for the executor.

> "It is true that Rule 25 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and our own General Rule 28, which deal with substitution of parties, do not expressly provide for substitution in a case like this.

But the power of equity to grant relief against injustice caused by the rigidity of procedure is broad enough to afford relief in this case." *National Bank of Washington* v. *District of Columbia, supra,* at 764.

The circumstances of this case provide an appropriate occasion for exercise of the Court's inherent powers. C.A.V. has been declared by two federal courts and one state court to be owner of the fund claimed by Petitioner.* The receiver, who formerly represented the interests of C.A.V. in this fund, has been dismissed. The vacation of the appointment of the receiver has left C.A.V. without representation in this Court. The Court, which promulgated the Federal Rules and its own rules, certainly has power to proceed in accordance with the general policy of the rules it formulated; to act without regard to narrow technicalities, to bring about substantial justice, and thus, to grant leave to be substituted where, as here, the interests of justice require.

II.

RULE 25(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS APPLICABLE.

The Federal Rules of Civil Procedure apply to actions pending in the district courts. Fed. R. Civ. P. 1. An action is deemed pending in the district courts for purposes of substitution, even after judgment, "(1) for purposes of appeal, or (2) for the purpose of subsequent proceedings to enforce or revive the judgment." *Moore's Federal Practice, op. cit. supra,* para. 25.03. The action is deemed to be pending until a judgment rendered by the district court is satisfied. *Becker Steel Co. of America* v. *Hicks,*

* There can be no doubt that Petitioner claims the moneys which were, by court order, transferred from the receiver to C.A.V. and, on agreement among all the parties, placed in escrow.

66 F.2d 497, 500 (2d Cir.), *cert. denied*, 290 U.S. 667 (1933). Moreover, it is pending although an appeal is being taken. *Danenberg* v. *Cohen*, 213 F.2d 946, 946 (7th Cir. 1954).

Accordingly, the courts of appeals have applied Rule 25(c) of the Federal Rules of Civil Procedure so as to allow substitution of parties on an appellate level. *E.g.*, *Meyers* v. *Canton Nat. Bank*, 109 F.2d 31, 34 (7th Cir. 1940), wherein the court, on the authority of Rule 25, allowed substitution of a successor receiver.

That C.A.V. comes within the terms of Rule 25(c) as the recipient of a transfer of interest is beyond question. See *Steingut* v. *Guaranty Trust Co. of New York*, 58 F. Supp. 623 (S.D.N.Y. 1944), supplemented, 60 F. Supp. 103 (S.D.N.Y. 1945), *aff'd and modified on other grounds*, 161 F.2d 571 (2d Cir.), *cert. denied*, 332 U.S. 807 (1947). There, an action was brought by a nationalized Russian bank to recover a deposit from a domestic trust company. Receivers of the assets of the bank were appointed pursuant to the New York Civil Practice Act, Section 977-b. The receivers were held properly substituted for the bank, pursuant to Rule 25(c), for it was they who were entitled to receive the bank's claim. Judge Rifkind said:

> "To say the least, therefore, this is a case of transfer of interest under Rule 25(c), whereby the court is authorized to order the substitution of the transferee as a party." *Id.* at 631.

III.

THE COURT SHOULD EXERCISE ITS POWER TO ALLOW SUBSTITUTION.

The interest of Petitioner lies exclusively in the proceeds from the sale of the bills of lading. These funds were held, at the time the action was commenced, by Farr,

and were transferred, in the course of the action, to the temporary receiver. By joining both Farr and the receiver as defendants, Petitioner sought to recover from either of them. See the opinion of the District Court, 193 F. Supp. 375, 377.

After this action was begun, the receivership was terminated. When the moneys were, pursuant to court order, about to be turned over to C.A.V. by the receiver, Petitioner immediately asserted its interest in them by entering into an escrow agreement with C.A.V., Farr, Peter L. F. Sabbatino, as Temporary Receiver, and Lehman Brothers, as Escrow Agent. Pursuant to this agreement, C.A.V., which previously had agreed to indemnify Farr against loss, agreed to the payment of the moneys to Petitioner, should Petitioner ultimately succeed.

Thus, the interests of C.A.V. in the proceeds of the sale are no longer represented.* Yet the disposition of the fund embodying these proceeds will be controlled by the judgment of this Court.

As C.A.V. is the only entity, other than Petitioner, which is financially interested in the judgment to be entered by this Court, and as C.A.V., from the time of the termination of the receivership, has not been represented in this action, it is equitable that C.A.V. should be granted leave to be substituted for respondent Sabbatino.

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* The interests of C.A.V. are neither legally nor practically represented by Farr. Although, under the indemnification agreement between Farr and C.A.V., Farr might have elected to be represented by C.A.V. or its attorneys, it chose otherwise. Farr now stands in the position of a stakeholder, having no economic interest in winning or losing in this action.

Conclusion

It is submitted that the Court has power to grant the movant leave to be substituted for respondent Sabbatino, and that the Court should exercise its power to grant such leave.

Respectfully submitted,

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